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# Supreme Court of the United States.

OCTOBER TERM, 1966.

No. 387

BRIAN T. MAGEE, BY HIS FATHER AND NEXT FRIEND, JOHN F. MAGEE, JR., AND JOHN F. MAGEE, JR.,
*Petitioners,*

*v.*

KATHLEEN F. LANE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

*To the Honorable the Justices of the Supreme Court of the United States:*

Your petitioners pray that a writ of certiorari issue to review the judgment of the Superior Court of the Commonwealth of Massachusetts entered after the rescript of the Supreme Judicial Court of Massachusetts dated April 28, 1966, in the case there entitled *Brian T. Magee et al., petitioners.*

### Opinion Below.

An opinion was filed by the Supreme Judicial Court of Massachusetts on April 28, 1966. It is reported in 1966

Mass. Adv. Sh. 797, 216 N.E. 2d 565. It is printed in the Appendix, p. 12. An earlier opinion in the same case is reported, *sub nom. Magee* v. *Lane,* in 346 Mass. 475, 194 N.E. 2d 393. It is printed in the Appendix, p. 13.

## Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), on the ground that the petitioners claim a right under the Constitution of the United States.

The writ is sought to be directed to the Superior Court, and not to the Supreme Judicial Court, because, under the Massachusetts statutes (Massachusetts General Laws (Ter. Ed.) c. 211, § 8; c. 231, § 135) only questions of law are brought before the Supreme Judicial Court and the record remains in the Superior Court. *McDonald* v. *Massachusetts,* 180 U.S. 311; *Rothschild* v. *Knight,* 184 U.S. 334. See also *Hodges* v. *Snyder,* 261 U.S. 600, 601.

The relevant date for the measurement of time for filing this petition is the date of the rescript of the Supreme Judicial Court, not the date of the entry of judgment in the Superior Court. *Cole* v. *Violette,* 319 U.S. 581. It is presumably immaterial, for this purpose, that a petition for rehearing was filed and denied (Appendix, p. 16). See *Powers* v. *Sturtevant,* 200 Mass. 519. The rescript is dated April 28, 1966.

## Question Presented.

When, at the trial in a state court of an action for damages for personal injuries to a ten-year-old boy, the evidence shows that the plaintiff suffered such extensive injuries of a permanent character that, if he is entitled to

recover at all, he should receive compensation in the amount of $35,000 to $50,000, and the jury returns a verdict for the plaintiff but awards damages of only $1,200, does the entry of judgment for such grossly inadequate damages deprive the plaintiff of property without due process of law?

## Constitutional Provision Involved.

The constitutional provision involved is the following clause of section 1 of Amendment XIV: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

## Statement of the Case.

On February 23, 1959, petitioner Brian T. Magee, then a boy ten years of age, suffered serious and permanent injuries when struck by an automobile operated by the respondent, Kathleen F. Lane, while he was standing in the street behind a parked automobile which he was helping another boy to unload. In accordance with the local practice, a damage action against the respondent was brought in his name by his father as next friend of the minor. The father, petitioner John F. Magee, Jr., joined as a plaintiff in his own name, claiming consequential damages for hospital and medical expenses incurred.

Under the authority of Massachusetts General Laws (Ter. Ed.) c. 221, § 56, a justice of the Superior Court referred the case to an auditor for hearing and findings. The statute provides that "The auditor's findings of fact shall be prima facie evidence upon such matters only as are embraced in the order; . . ." After hearing, the auditor found for the defendant on the grounds that (1) the

infant plaintiff was guilty of contributory negligence, and (2) the defendant was not guilty of negligence.

At a subsequent trial by a jury in the Superior Court there was testimony of witnesses both as to the circumstances of the accident and as to the extent of the injuries. The latter was to the effect that the immediate injuries were, in addition to various contusions and abrasions, buckle fracture of the proximal fourth of each tibia, the left side being a compound comminuted fracture with marked displacement and posterior bowing, and on the right side a comminuted closed fracture with valgus deformity, and fracture of the left tibia.

The boy was hospitalized for some two weeks and for some six weeks his legs were in plaster casts. He also suffered from osteoporosis of the bones of both legs. He had a limp due to the bent knee type of gait caused by a loss of extension of both knees.

A year after the accident he had a 20% loss of flexion in both knees and a 5% loss of hyperextension and walked with a left intoeing gait. His heel cords were mildly tight. He had a knock-knee deformity in the left knee measurably 15% on the left and the right leg showed lateral bowing. These conditions in the opinion of a qualified orthopedic surgeon are permanent (R. 14-16).

The findings of the auditor were also read to the jury.

The jury returned a verdict of $1,200 for the infant plaintiff. Also, although there was evidence of no more than $856.50 in medical and hospital expenses, the jury returned a verdict of $1,200 consequential damages for the father.

The plaintiff duly and seasonably filed motions to discharge the reference to the auditor and the auditor's report, and to recommit the auditor's report, and marked them for hearing on Monday, September 18, 1961.

Before the hearing of the motions the case was called on September 11, 1961, in a regular call of the jury-list cases. On that day plaintiff's counsel requested a continuance of the case for jury trial to the October list, in order to afford him an opportunity to be heard on his motions.

The judge refused to grant a continuance and on the same day, September 11, 1961, ordered trial of the case to go forward, a jury was empaneled and sworn, and on the next day the Court heard counsel on the two motions, and forthwith summarily denied both motions, and ordered trial of the case to go forward.

After the verdict the plaintiff perfected his exceptions to the denials, and the exceptions were overruled by the Supreme Judicial Court. *Magee* v. *Lane,* 346 Mass. 475. In its opinion the Court said (346 Mass. at 477): "Apparently, the plaintiffs take the position that the somewhat meager award of damages was a compromise which was due in part at least to the auditor's finding for the defendants on the issue of liability. We note from the docket entries that the plaintiffs have filed a motion for a new trial. It appears that this motion has never been acted upon. Thus it is still open to the plaintiffs to press the question of inadequacy of damages before the trial judge."

The plaintiffs thereupon had a hearing before the trial judge, who denied the motion for a new trial. The plaintiffs then prepared a bill of exceptions in order to obtain a review of the denial in the Supreme Judicial Court. The trial judge disallowed the bill on the ground that the exceptions did not meet the statutory standard that "they are conformable to the truth." Massachusetts General Laws, c. 231, § 113. In disallowing the bill the trial judge recited that the plaintiffs "intentionally omitted to include in said bill important testimony of witnesses given at the trial on issues presented to the Court and jury for de-

termination, and intentionally omitted to include in said bill other important proceedings at the trial."[1] The judge further recited that "the bill does not set forth a full and fair summary of the proceedings at the trial adequate to show the whole case which was surveyed and considered by the Court after hearing arguments by the parties on the grounds set forth in plaintiffs' motion for [a] new trial, and that the plaintiffs, or their attorney, intentionally omitted to include such matters in said bill"[2] (R. 19).

After disallowance of the bill of exceptions the plaintiffs proceeded, under Massachusetts General Laws, c. 231, § 117, as amended by Massachusetts Acts, 1960, c. 207, § 4, to file a petition before a justice of the Supreme Judicial Court "to establish the truth of" their exceptions. The petition was referred to a commissioner, who reported that "[I]n general, plaintiffs' counsel's argument to the [trial] Court on the motion for a new trial was based

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[1] This language need not carry the sinister implication it might seem to bear on its face. The bill of exceptions was intended to set forth only the trial proceedings bearing on damages, and it intentionally omitted reference to most trial proceedings bearing upon liability, since the jury's finding of liability was not contested.

[2] This probably has reference to the fact that the motion for a new trial was multi-pronged, and was laid, in more or less stereotyped fashion, on six grounds:

1. The verdict is against the evidence;
2. The verdict is against the weight of the evidence;
3. The verdict is against the evidence and against the weight of the evidence;
4. The verdict is against the law;
5. The verdict is against the evidence and the law;
6. The verdict is inadequate (R. 6.)

At the hearing on the motion the plaintiffs pressed only the last of these points, and again attempted to summarize only those proceedings at the trial which were relevant to that point (R. 38-46).

on the whole trial with special emphasis on the inadequacy of damages found" (R. 31). The commissioner went on to find that the bill of exceptions does not conform to the truth in that (*a*) it does not reflect the examination of various witnesses who had testified with respect to liability (R. 31-32), and (*b*) it omitted certain minutiae of the recitals in the hospital records of the minor plaintiff's treatment, and of the cross-examination of the X-ray specialist who had testified at the trial (R. 32-34). On the basis of the commissioner's report, and of his own examination of the transcript, the single justice found that the bill of exceptions is not "conformable to the truth," and he dismissed the petition (R. 52). The plaintiffs' exceptions to the dismissal were overruled by the Full Court.

It thus appears that neither in the Superior Court nor before the single justice of the Supreme Judicial Court nor before the full bench of that Court were the petitioners heard on the merits of their contention that the damages awarded by the jury were grossly inadequate.

**The Federal Question in the Courts Below.**

The question presented was timely raised, both indirectly and directly, after the jury returned its verdict. The petitioners attempted to raise it indirectly by seeking reversal of the trial court's denial of their pre-trial motions to discharge the reference to the auditor and to recommit the auditor's report. Although the Supreme Judicial Court decided that this was not the appropriate remedy, it recognized that the plaintiffs' objective was the correction of a gross inadequacy of the damages awarded by the jury's verdict. *Magee* v. *Lane, supra,* 346 Mass. 475, 476, 477.

The petitioners directly raised the question by pressing their motion for a new trial, (which the Supreme Judicial Court indicated was the appropriate remedy, *Magee* v. *Lane,* 346 Mass. at 477), and seeking review of the denial thereof.

The claim of right in the question presented was not specifically denominated a claim of deprivation of Fourteenth Amendment Due Process of Law, but any formal deficiency in this respect was removed when the petitioners applied (Appendix, p. 16) for a rehearing and specifically alleged that the minor plaintiff "has been deprived of his rights and privileges under Articles 5 [*sic*] and 14 of the Constitution of the U.S.A." The substantial nature of the claim of right was clearly stated and understood (*Magee* v. *Lane, supra*), and the requirement that the claim of federal right be timely raised is one of substance, not of form. *Braniff Airways, Inc.,* v. *Nebraska State Board of Equalization & Assessment,* 347 U.S. 590, 598-599.

Nor can it be said that the disposition of the case by the state court is rested upon an adequate state ground. Failure to consider the merits of a substantial claim because the pleadings (here the bill of exceptions) do not contain recitals irrelevant to the claim is a "springe" which the state may not set to bar enforcement of a federal right. See *Davis* v. *Wechsler,* 263 U.S. 22, 24-25. As has been said, "Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved." *Brown* v. *Western Railway of Alabama,* 338 U.S. 294, 299. (The instant case is an even stronger case for application of this principle, because the petitioners here, unlike the petitioner in *Brown,* had no option to raise their claim elsewhere than in a state court.)

It is submitted that in this case "the State's insistence on compliance with its procedural rule" does not serve "a legitimate state interest." See *Henry* v. *Mississippi*, 379 U.S. 443, 447. It will be remembered that there was a motion for a new trial, which was denied by the trial judge. The petitioners presented a bill of exceptions as the vehicle to bring that denial to the Supreme Judicial Court for review. Its sole function was to give the reviewing court the basis for determining whether the alleged grounds for a new trial, inadequacy of damages, existed. To fulfill this function it need contain recitals of only those trial proceedings which are relevant to the alleged grounds. This procedure is provided by Massachusetts General Laws, c. 231, § 113. Had the exceptions gone to the Supreme Judicial Court, and had that Court decided that the denial of the motion for a new trial was error, then, and only then, trial proceedings other than those related to the issue of inadequacy of damages might have become significant. Under the Massachusetts practice (Massachusetts General Laws, c. 231, § 128) it is only after a determination that a verdict should be set aside and a new trial had because of the inadequacy of damages at the first trial that the further determination is made, *by the trial judge, not by the Supreme Judicial Court,* whether the new trial shall be of the whole case, or shall be limited to the issue of damages. This determination is made, not upon the bill of exceptions, but upon whatever the trial judge uses to inform his discretion. Thus a requirement of the inclusion, in a bill of exceptions, of material not conceivably involved in the function of the bill cannot be said in any way to serve a "legitimate state interest" which would justify defaulting a claim of federal right.

**Reasons for Granting the Writ.**

1. The decision below does not accord with decisions of this Court to the effect that a state court procedure which leads to a damage verdict which is manifestly and grossly inadequate is wanting in the Due Process of Law required by the Fourteenth Amendment. *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago,* 166 U.S. 226, 231, *et. seq. Roberts* v. *New York City,* 295 U.S. 264, 277.

2. It is important that we have a clarification of doctrine to the effect that the Due Process of Law which the cited cases said would not be compatible with manifestly and grossly inadequate damage verdicts in land-taking cases is equally intolerant of manifestly and grossly inadequate damage verdicts in personal injury cases.

3. There is need of clarification of the fact that this Court, in holding state courts to the standards of fairness imposed by the Due Process Clause of the Fourteenth Amendment, is not inhibited by any fancied radiations from the Seventh Amendment, and may, at least in extreme cases, scrutinize grossly improper findings of state court juries. *Cf. Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U.S. 474.

4. This Court, which has been astute in its scrutiny of state processes and procedures insofar as they impinge upon persons accused of crime, should be equally solicitous that the processes and procedures which the states establish for granting civil relief to persons within their jurisdiction are themselves fair and are administered fairly and impartially. This case presents an opportunity for this Court to inquire to what extent the Constitution contains a mandate to the states to establish and maintain effective controls to prevent gross miscarriages of justice in the form of jury verdicts.

## Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Counsel for Petitioners.*

## Appendix.

### Rescript.

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
At Boston, April 28, 1966.

In the case of Brian T. Magee & another, petitioners pending in the Supreme Judicial Court for the County of Suffolk

Ordered, that the following entry be made in the docket; viz.,—Exceptions overruled.

By the Court,
RICHARD A. MCLAUGHLIN, Clerk.

April 28, 1966

### Rescript Opinion.

BRIAN T. MAGEE & another, petitioners.

1966 Mass. Adv. Sh. 797.

This petition to establish the truth of exceptions pursuant to G.L. c. 231, § 117 (as amended through St. 1960, c. 207, § 4), was dismissed by the single justice. The petitioners, who were plaintiffs in a tort action in the Superior Court (*Magee* v. *Lane,* 346 Mass. 475), filed a bill of exceptions to the denial of their motion for a new trial. This bill the trial judge disallowed as not conformable to the truth. He found that the "plaintiffs, or their attorney, intentionally omitted to include in said bill important testimony of witnesses given at the trial on issues presented to the Court and jury for determination, and intentionally omitted to include in said bill other important proceedings at the trial." He further found that "the

bill does not set forth a full and fair summary of the proceedings at the trial adequate to show the whole case which was surveyed and considered by the Court after hearing arguments by the parties on the grounds set forth in plaintiffs' motion for [a] new trial, and that the plaintiffs, or their attorney, intentionally omitted to include such matters in said bill." The plaintiffs' position is that there was set forth a full and fair summary of the evidence upon the issue of damages, which was the only issue in their motion pressed by them. This contention lacks merit. "The statements of the judge in disallowing the exceptions are prima facie to be treated as true and will stand unless rebutted, explained or overcome by other evidence." *Maguire, petitioner,* 340 Mass. 12, 14, and cases cited. The rulings of the single justice, to which the plaintiffs except, were based on findings in a commissioner's report. The commissioner found that the bill of exceptions did not conform to the truth. There was no error by the single justice in denying the plaintiffs' motion to recommit the commissioner's report, or in denying their motion to strike portions of it, or in overruling their objections to the report, or in not acting upon the plaintiffs' requests for rulings.

*Exceptions overruled.*

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**Opinion.**

346 Mass. 475.

BRIAN T. MAGEE & another *vs.* KATHLEEN F. LANE & another.

Norfolk. November 4, 1963.—November 29, 1963.

Present: SPALDING, WHITTEMORE, CUTTER, KIRK, & SPIEGEL, JJ.

TORT. Writ in the Superior Court dated August 4, 1959.

The plaintiffs alleged exceptions to the denial of certain motions by *Murray, J.*

*Timothy J. McInerney* for the plaintiffs.

*Daniel A. Lynch* (*Paul F. Degnan* with him) for the defendants.

SPALDING, J. In this action of tort, Brian T. Magee, hereinafter called the plaintiff, seeks to recover for injuries sustained by him on February 23, 1959, when he was struck by an automobile.[1] His father seeks consequential damages.

The auditor, finding that the plaintiff was not in the exercise of due care and that the defendants were not negligent, found for the defendants. Thereafter the case was tried to a jury on the auditor's report and other evidence. The jury returned verdicts for the plaintiff on count 1 and for his father on count 3.

Despite the fact that the verdicts were in the plaintiffs' favor they bring the case here on exceptions. Doubtless this is because the award of damages ($1,200 on each count) was thought to be small in view of the fact that the plaintiff sustained substantial injuries.

Notwithstanding the plaintiffs' elaborate substitute bill of exceptions, there are but two questions presented for decision in the bill as finally allowed by the judge. These questions are (1) whether the judge erred in the denial of the plaintiffs' motion to discharge the reference to the auditor and (2) the correctness of his action in denying the plaintiffs' motion to recommit the report. We shall confine our decision to these questions.

1. The denial of the motion to discharge the auditor's report reveals no error of law. The motion was supported by a lengthy affidavit purporting to show that the audi-

[1] The declaration contains four counts. Counts 1 and 3 are against the operator, and counts 2 and 4 are against the owner.

tor's report was founded on inadmissible evidence or incorrect rulings of law. The judge was not required to believe the matters set forth in the affidavit. The evidence before the auditor was not reported and we cannot say that his findings were based upon inadmissible evidence or erroneous rulings of law. No request was made at the trial to have any finding excluded on the ground that it was based on an erroneous opinion of law or upon inadmissible evidence. See G.L. c. 221, § 56; *Petitti* v. *Perriello,* 305 Mass. 274, 275. The denial of the motion to discharge the rule to the auditor was within the discretion of the trial judge and no abuse of discretion has been shown. *Hunneman* v. *Phelps,* 199 Mass. 15, 20.

2. There likewise was no error in the denial of the plaintiffs' motion to recommit the auditor's report. The so called "exceptions" to the report, which we treat as objections, "have no purpose other than that of laying a foundation for a motion to recommit and action upon such a motion rests in the sound discretion of the judge." *Ball* v. *Williamson,* 336 Mass. 547, 551. We perceive no ground for disturbing the action of the judge in denying the motion.

3. Apparently, the plaintiffs take the position that the somewhat meager award of damages was a compromise which was due in part at least to the auditor's finding for the defendants on the issue of liability. We note from the docket entries that the plaintiffs have filed a motion for a new trial. It appears that this motion has never been acted upon. Thus it is still open to the plaintiffs to press the question of inadequacy of damages before the trial judge. The principles of law touching motions of this sort have been set forth at length in the leading case of *Simmons* v. *Fish,* 210 Mass. 563, and need not be restated. Whether the verdicts here were compromise verdicts and ought to be set aside, as to which we make no intimation

one way or the other, is a question for the trial judge to pass upon when he considers the motion.

*Exceptions overruled.*

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**Letter to Chief Justice Wilkins.**

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TIMOTHY J. MCINERNEY
JAMES P. KIERNAN
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June 9, 1966

Hon. Raymond S. Wilkins, Chief Justice
Massachusetts Supreme Judicial Court
Pemberton Square
Boston, Massachusetts

My dear Chief Justice Wilkins:

In re: Brian T. Magee et al, Petitioners
#13,560

On behalf of the petitioners, I respectfully request a rehearing of this matter wherein a Rescript Opinion was rendered by the Full Court on April 28, 1966 overruling the petitioners' Exceptions.

We respectfully submit that the Full Court did not meet the issue presented by the petitioners' Bill of Exceptions. In so doing, it is respectfully submitted that the Court has permitted or otherwise countenanced a gross miscarriage of justice.

Petitioners were plaintiffs in an action of tort which had been tried in the Superior Court, first to an Auditor, facts not final, and then to a jury, Murray, J. presiding. They seasonably filed a Motion for New Trial in which

several grounds were set forth. They seasonably claimed Exceptions to the denial of their Motion and seasonably filed and presented their Bill of Exceptions.

Upon disallowance of their Bill, they filed the instant Petition to Establish the Truth of Their Exceptions, which was heard by a Single Justice, and was referred to a Commissioner who filed his Report in due course, following which the Single Justice dismissed the Petition. Thereafter, petitioners duly and seasonably claimed Exceptions to the Rulings and Orders of the Single Justice, and in due course were heard by this Court.

As recognized by the Court in its Rescript Opinion, petitioners' position was that they were required to and did set forth a full and fair summary of the evidence upon the issue of damages, which was the only issue pressed by them.

We respectfully submit that the Bill of Exceptions which we filed was a serious effort to comply with the requirements set out in Frey Co. v. Silk, 245 Mass. 534, 537, and also the requirements spelled out in Rosen, Petitioner, in 236 Mass. 321 at 324.

See Mitchell v. Silverstein, 323 Mass. at 241.

It was the further position of the petitioners that in drawing their Bill so as to present their Exceptions in a summary manner as required by law, they were not required to set out a summary of all of the evidence material to all of the other issues raised by the pleadings, namely, the due care of the defendant operator or of the defendant owner and the due care of the minor plaintiff.

In treating with the issue raised by petitioners, this Court related that the trial Judge, in disallowing the petitioners' Bill, found that the "plaintiffs, or their attorney, intentionally omitted to include in said Bill important testimony of witnesses given at the trial on issues presented to the Court and jury for determination, and intentionally

omitted to include in said Bill other important proceedings at the trial," and that "the Bill does not set forth a full and fair summary of the proceedings at the trial, adequate to show the whole case which was surveyed and considered by the Court after hearing arguments by the parties on the *grounds* set forth in plaintiffs' Motion for (a) New Trial, and that the plaintiffs, or their attorney, intentionally omitted to include such matters in said Bill." (Emphasis supplied).

Citing Maguire, petitioner, 340 Mass. 12, 14 and cases cited, "The statements of the Judge in disallowing the Exceptions are prima facie to be treated as true and will stand unless *rebutted, explained or overcome by other evidence.*" (Emphasis supplied), the Court decided that petitioners' "contention lacks merit."

It is submitted that cases like Maguire, petitioner, 340 Mass. 12, cited in the Rescript, should not be regarded as controlling here. There, the Judge who disallowed the Bill of Exceptions was specific as to wherein it was not conformable to the truth. Clearly, in those circumstances failure to rebut the Judge's specifications was failure to set forth a full and fair statement of the proceedings relevant to the issue tendered. Here, however, the matter is not so clear. The trial Judge did not specify wherein the Bill was not conformable to the truth. Instead, he made general reference to omission of testimony and other trial proceedings.

Included in the record in our case, not only in the proceedings had before the Single Justice and the Commissioner, but also in the proceedings held by this Court, were the transcript of the evidence at the jury trial, the exhibits introduced thereat, and the transcript of the argument by counsel for the petitioners at the hearing on their Motion for New Trial held December 18, 1963.

It is respectfully submitted that these materials made it crystal clear that petitioners had pressed their Motion for New Trial solely on *the ground of inadequacy of damages* and had, in their Bill, set out in summary manner, a full and fair summary of the evidence material to the issue raised and pressed by them.

It also appears from these materials to be crystal clear that the aforementioned findings of the trial Judge were plainly rebutted, explained and overcome.

It is further respectfully submitted that what has been said as to the aforementioned findings of the trial Judge, applies with equal force and vigor to the findings of the Commissioner and the Single Justice.

The mere fact that petitioners filed their Motion for New Trial on the usual grounds is not controlling in the circumstances here presented. It would hardly be expected that petitioners, having obtained a verdict, would press for a new trial on all grounds, including the question of liability, but it would be expected that they would press, as they did press, for a new trial solely on the grounds of inadequacy.

On the other hand, in a case where a verdict is for the defendant, then it would be expected that plaintiff would press his Motion for New Trial on all grounds.

Such is not the case here.

It is further submitted that the recitals in the Bill of Exceptions constitute a full and fair summary of the trial proceedings bearing upon the adequacy of the damages, and that it is not taken out of that category by omission of the minutiae enumerated in the Commissioner's Report (R. 31 et seq.). In the first place, most of these minutiae bore upon the issue of liability, as to which no issue was tendered by the plaintiff on his Motion for a New Trial and his exceptions to the denial thereof. In the second place, the minutiae with respect to hospital records and

medical testimony (R. 32-34) are not significant. Their inclusion would in no way have been in derogation of the conclusion from the recitals in the Bill that the verdict of $1,200.00 for the injuries described in the Bill was grossly inadequate. It is submitted that the requirement that a Bill of Exceptions contain a "full and fair" summary of the trial proceedings should not be distorted into a standard that it must contain a complete and exhaustive recital of everything said and done during the course of the trial.

If the Full Court finds and we respectfully submit that it must find as a matter of justice and law and reason that the trial Judge's Findings, Rulings and Order are in error, then the Bill should be established and the Court come to "grips" with the other issue, namely, inadequacy of damages.

Accordingly, it is submitted that this Court has erroneously dismissed petitioners' Exceptions and by so doing, has deviated from established law of this Commonwealth of long standing, has, without due process of law, deprived petitioner, Brian T. Magee, (the minor plaintiff) of his valuable property right in his cause of action against respondent, Kathleen F. Lane, the defendant operator, contrary to the provisions of Amendment 14 of the Constitution of the U.S.A., and has denied to said petitioner the equal protection of the law, contrary to said Amendment 14.

The petitioners further submit that they have been denied due process of law because they were burdened with a highly prejudicial, unfair, Auditor's Report; that they were denied due process of law because they were burdened with "Findings, Rulings and Order" of the trial Judge, and that they were denied due process of law because they were burdened with the prejudicial argument of defendants' counsel to the Jury.

Similarly, the plaintiffs allege that they have been denied their property without due process of law—that is, fair and reasonable, just and adequate damages in this instance for the minor's very serious injuries.

The minor plaintiff also alleges that he has been denied the equal protection of the law because he has received an inadequate award for his most serious injuries, and he has been deprived of his rights and privileges under Articles 5 and 14 of the Constitution of the U.S.A.

We respectfully urge that the discretion exercised by the trial Judge in this case was willful and arbitrary, if not downright injudicious and unjust, and if allowed to stand will be a serious miscarriage of justice, in view of the great disproportion between the verdict awarded and the very serious injuries sustained by the minor plaintiff.

Additionally, we think it highly important and material for the Court to be informed and know the background of the proceedings in the instant case in part orally presented by counsel for the respondents in the recent hearing by this Court, viz:

*A.* Prior to hearing the action, the Auditor had stated in my presence that he would not believe a police officer "on a stack of Bibles," that he had forty-two years of experience in Woburn District Court on criminal cases with the police and for that reason he "would not believe any one of them on any occasion."

At the time, I was of the opinion that he was making an extravagant statement of his attitude, no doubt resulting from some particular happening in a recent proceeding before him. His report, however, in the instant action demonstrated that he was in fact accurately describing his attitude toward police officers.

In this regard, the plaintiff was a boy, nine years of age. His father, a Brookline police officer had testified before the Auditor as to his observations of his son's

injuries, among other matters. Additionally, several other Brookline police officers called by the plaintiffs, had testified before the Auditor as to their observations of matters occurring immediately following the accident, the condition of the way, the position of the vehicles, the appearance of and injuries to the boys involved in the accident and statements made by the defendant operator.

During the course of the hearings before the Auditor, it appeared, I regret to say, that he was indulging himself in alcoholic beverages. It was his custom to adjourn for lunch at 12:30 P.M. and to resume the hearings in a half hour or so, adjourning for the day at 3:30 P.M., it being apparent that his lunch had consisted of a few Manhattans.

A companion case of the Sullivan boy, about the same age as the plaintiff, who was also severely injured in the same accident, was consolidated with the action for trial. The other boy was represented by Attorney John Finnerty, who usually represents insurers and who is friendly with counsel for the respondents. During the course of the Auditor's hearing, Attorney Finnerty, not having put any witnesses on the stand and not having questioned any witnesses, settled his companion case, I am reliably informed, (namely, from the mother of this other minor involved) for $35,000.00.

In due course, I moved to discharge the Auditor's Report and to recommit the Report for these and other reasons. The presiding Judge, Murray, J., refused to hear me in respect to the aforementoned matters relating to the Auditor. He cut me off summarily when I reverted to these matters and thus made it impossible for me to bring before him the obvious prejudices of the Auditor and his unconscionable conduct at the hearings.

*B.* The case came on to be heard on the jury list in Dedham in September 1961 at which time I directed to

the Court's attention the fact that there was pending in that Court a Motion to Discharge the Auditor's Report and a Motion to Recommit the Auditor's Report, and also directed Judge Murray's attention to the fact that both of these Motions were on the motion list for the following week and I requested a postponement of the jury trial until October until counsel had argued the two Motions to Discharge and Recommit the Auditor's Report. Judge Murray refused to answer my request for a postponement and stated merely that he would hold the case for trial. A little later on, on the same day, he had the Clerk call the case and directed counsel to proceed with the trial of the case. I protested that my two Motions pertaining to the Auditor's Report had not been heard. He ignored my protests and I took an Exception, and he ordered us to proceed.

A jury was empanelled and sworn, and I was directed to proceed with the reading of the pleadings and to make an opening, which I objected to as being against orderly procedure and plaintiffs' rights and saved an Exception to Judge Murray's order to proceed forward with the trial. It was then almost 4:00 o'clock so he declared the Court adjourned until the following morning.

On the following morning, after he had finished the call of the list and disposed of other matters, he then announced the "Court will hear counsel on the two Motions," whereupon I argued my Motions to Discharge the Auditor's Report and to Recommit the Auditor's Report, after a fashion! I say this because Judge Murray would not allow me to put on the record the type of Auditor we had or anything pertaining to his conduct during the trial of the case before the Auditor. When I concluded my truncated argument, Mr. Lynch argued against Recommital and Discharge of the Auditor's Report. Murray, J. summarily announced denial of the Motions and ordered trial of the case forward.

To me, this was a high-handed, autocratic, unjust, unfair way for a Judge of the Superior Court to conduct himself, and I was powerless to do anything about it, except claim an Exception.

Without even hearing me on the Motions, he had decided in advance to force the case forward to trial and after the trial had started, gave me a perfunctory hearing only and then denied my Motions and even limited my arguments on the Motions!

*C.* With due respect to Judge Murray, it should be pointed out, that his conduct of the jury trial markedly demonstrated the accuracy of his reputation among the members of the trial Bar in general, that he is, to say the least, most exacting of plaintiffs and their counsel in tort actions. For example, although evidence was adduced by the plaintiffs that the minor plaintiff was permanently, partially disabled, Judge Murray refused to permit actuarial testimony as to the minor's life expectancy. Additionally, he permitted counsel for the respondents, in his argument to the jury to accuse every witness called by the plaintiffs of lying and to assert that somebody "by hook or by crook" decided that plaintiffs were going to win the case. Notwithstanding my protests and objections, and my request to the presiding Judge to instruct the jury to ignore this latter argument, the Judge declined to do so.

*D.* Thereafter, I seasonably drafted a Bill of Exceptions, not only with regard to Judge Murray's denial of my Motions to Recommit the Report and to Discharge the Report, but also as to certain rulings on evidence and other matters occurring at the jury trial. Judge Murray held several hearings on this Bill of Exceptions and plaintiffs' Substitute Bill of Exceptions. May I state categorically (and opposite to what counsel for the respondents represented to this Court) that not once during the course of these hearings did Judge Murray make any suggestion

to me to delete any portion—no, not even a sentence or a single word—from the Bills pending before him, nor did he make any suggestion that anything be added to the bill or to the Substitute Bill.

In connection with the Bill of Exceptions, at a hearing on January 4, 1962, plaintiffs were given leave by Judge Murray to file within forty-five days proposed amendments to the Bill. These amendments, according to the Judge's order, were to be filed with him personally—rather than in the Clerk's Office as is customary. Upon the opening of the February term, I was engaged in Suffolk Superior Court in a lengthy trial before Judge Spring and a jury involving a most serious brain injury case—a trial which lasted until March 6, 1962.

On February 16, 1962, being the last day for filing the proposed amendments to this Bill, and while I was engaged before Judge Spring, no one in my office being then available, I arranged to have my wife appear before Judge Murray in Middlesex Superior Court for the purpose of filing the proposed amendments. Judge Murray refused to receive them from her. She so reported to me during the mid-day recess in Judge Spring's session. I explained the problem to Judge Spring and by his courtesy, the trial was adjourned that day at 3:30 P.M. I immediately went to Judge Murray's session in Cambridge. I arrived a few minutes before 4:00 P.M. when he adjourned the trial then being held before him.

I immediately approached the bench and handed the proposed amendments to the Clerk in the session. He handed them to the Judge who gave them back to the Clerk, stating "I thought I made it clear that I would not accept these this morning." As the Judge walked off the bench, I said to him "You ordered me to file this with you in person and I am doing what you ordered, and now you won't let me do it."

The Clerk handed the proposed amendments back to me and the Judge went into the Lobby. I told the Clerk that the Judge had ordered me to present the amendments to him in person and that I was merely trying to comply with his order. I requested the Clerk to take the amendments to the Judge in his Lobby, and to remind him of his order and also to remind him that this was the last day in which the amendments could be filed. The Clerk did so.

Earlier in the same day, Judge Murray had endorsed on the amendments:

"Leave to file the within paper is hereby denied."

Later on, after I had appeared in his session, he made an additional endorsement on the amendments:

"The within paper may now be filed notwithstanding the order of February 16, 1962 endorsed hereon."

ORDERED: "This case is set down for hearing at the Jury Waived Session held at Boston at 9:15 A.M. on March 6, 1962 on the following matters:

1. Whether the Proposed Amendments to the Bill of Exceptions shall be allowed; and

2. Whether the Bill of Exceptions shall be disallowed.

"The hearing will be held and the above questions will be determined whether counsel appear or not."

"Plaintiffs are hereby ordered to give a copy of the within Proposed Amendments to opposing counsel on or before March 1, 1962."

Thereafter, by leave of Judge Murray, I filed plaintiffs' Substitute Bill of Exceptions and after hearing thereon, Judge Murray disallowed the Substitute Bill in part and allowed it in part, this being the Bill which was before this Court in Magee v. Lane, 346 Mass. 475, being restricted

to plaintiffs' Exceptions to the denial of their Motion to Recommit the Auditor's Report and to Discharge the Report.

I respectfully submit that Judge Murray palpably abused his discretion in disallowing a portion of plaintiffs' Substitute Bill of Exceptions.

Additionally, plaintiffs' Motion for New Trial was first argued before Judge Murray on September 28, 1961. Despite my exhortations to him to act upon this Motion to save the litigants the expense of going before the Full Court on what after turned out to be their truncated Substitute Bill of Exceptions, Judge Murray refrained from acting on the Motion for New Trial. As a result, the costs to the father of the minor plaintiff for their first Appeal to the Full Court were almost $1,200.00.

*E.* After entry of the Rescript in Magee v. Lane, 346 Mass. 475, Judge Murray reheard plaintiffs' Motion for New Trial on December 18, 1963, and shortly thereafter appointed Atty. John H. Burke, Jr. to act as Conciliator or Referee. Conciliation having failed, Judge Murray on February 20, 1964 denied plaintiffs' Motion for New Trial, even though the argument was directed solely to the gross inadequacy between the verdict returned and the damages sustained.

*F.* This second Appeal which the minor plaintiff and his father were forced into cost approximately another $1,200.00 so that now the "cupboard is bare" for any satisfaction of the minor plaintiff's injuries—the little boy who was standing in the back of his uncle's car which was parked at the curbstone and while removing a bundle with another boy, was crushed against the bumper and sustained extremely serious personal injuries that warrant a verdict in the neighborhood of $20,000.00 to $25,000.00 at least, which injuries were caused solely by the negligence of the defendant operator.

It should also be brought to your attention that after Judge Murray denied the Motion for New Trial following the Rescript in 346 Mass. 475, we twice sought an extension of time to prepare and file a Bill of Exceptions and Judge Murray twice summarily refused to grant us any extension of time to file the most recent Bill of Exceptions, even though defendants' counsel had assented to the extension.

Accordingly, we earnestly and respectfully urge that the Full Court in the interest of justice, grant a re-hearing of the instant Petition otherwise, in my opinion, a most serious miscarriage of justice will take place.

Six additional copies of this letter are enclosed for the convenience of your colleagues.

Very sincerely and respectfully yours,

TIMOTHY J. MCINERNEY

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**Letter from Chief Justice Wilkins.**

SUPREME JUDICIAL COURT
BOSTON, MASSACHUSETTS

Raymond S. Wilkins
Chief Justice

June 14, 1966

Timothy J. McInerney, Esquire
6 Beacon Street
Boston, Massachusetts 02108

Dear Sir:

Your request for rehearing in case No. 13,560, *Brian T. Magee & another, petitioners,* has been received, has been considered by the court, and is denied.

Yours truly,

R. S. WILKINS
Chief Justice

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**Massachusetts General Laws, Chapter 221.**

SECTION 56. When a civil action is at issue, the supreme judicial or superior court, in its discretion, and a district court, if both parties assent thereto in writing, may appoint one or more auditors to hear the parties, examine their vouchers and evidence, state accounts and report upon such matters therein as may be ordered by the court. The auditor's findings of fact shall be prima facie evidence upon such matters only as are embraced in the order; but the court at the trial shall exclude any finding of fact which appears in the report to be based upon an erroneous opinion of law, or upon inadmissible evidence. Whenever the auditor makes a ruling as to the admissibility of evidence and objection is taken thereto he shall, if requested so to do make a statement of such ruling in his report. The auditor shall not make any finding of fact which depends upon the decision of a question of law, unless he makes alternative findings or states in his report the view of the law upon which his finding depends, together with such subsidiary facts as will enable the court to pass upon the question. [As appearing in Tercentenary Edition.]

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**Massachusetts General Laws, Chapter 231.**

SECTION 113. Exceptions may be alleged by any party aggrieved by an opinion, ruling, direction or judgment of the supreme judicial court, of the superior court, or of the land court, rendered upon any matter of law in any civil cause, according to the course of the common law or otherwise, tried by a jury or heard by the court, or upon a motion for a new trial. The exceptions shall be reduced to writing in a summary manner and filed with the clerk, and notice thereof shall be given to the adverse party, in

civil cases tried by a jury, within twenty days after the verdict is rendered, and in cases tried without a jury, within twenty days after the notice of the decision has been received, unless further time is allowed by the court. The presiding justice shall thereafter, upon their presentation to him by any party to the action, examine the exceptions, and after hearing the parties, determine whether they are conformable to the truth. The excepting party may be allowed to make such amendments to his bill of exceptions as will make it a more accurate statement of the exceptions originally filed by him. If the presiding justice finds that the exceptions, with any amendments thereof thus allowed, are conformable to the truth, he shall allow them. The presiding justice may, if, in his opinion, a bill of exceptions is filed in good faith, and justice so requires, allow such bill of exceptions although the excepting party or his attorney failed, through inadvertence, to comply with all of the provisions of this section. If, through inadvertence, a party who has duly claimed exceptions failed to file a bill of exceptions within said twenty days or within such further time as may have been allowed, the presiding justice may, before final judgment, upon motion after notice and hearing, allow a bill of exceptions to be filed and may allow such bill of exceptions. [As last amended by St. 1945, c. 328.]

Section 117. If the presiding justice, or another justice acting under section one hundred and fifteen, disallows or fails to sign and return the exceptions or alters any statement therein, and either party is aggrieved thereby, the truth of the exceptions presented may be established before any justice of the supreme judicial court upon petition stating the grievance, and thereupon, the truth of the exceptions being established, they shall be entered and heard, and the same proceedings taken, as if the exceptions had

been duly allowed and entered. The supreme judicial court shall make rules for settling the truth of exceptions alleged and not allowed. Such petition shall be filed with the clerk of the supreme judicial court for Suffolk County. [As last amended by St. 1960, c. 207, § 4.]

SECTION 128. Whenever a verdict is set aside and a new trial granted under section one hundred and twenty-seven, the justice granting the motion for the new trial shall file a statement setting forth fully the grounds upon which the motion is granted, which statement shall be a part of the record of the case. If it appears from the statement that the sole ground for granting the motion was that the damages awarded were excessive, then the new trial shall be limited to the question of the amount of damages. If it appears from the statement that the sole ground for granting the motion was that the damages awarded were inadequate, the court in its discretion may grant either a new trial of the whole case or a new trial limited to the question of the amount of damages. [As appearing in Tercentenary Edition.]

Office Supreme Court, U.S.
FILED
AUG 25 1966
JOHN F. DAVIS, CLERK

# Supreme Court of the United States.

OCTOBER TERM, 1966.

No. 387.

BRIAN T. MAGEE, BY HIS FATHER AND NEXT FRIEND, JOHN F. MAGEE, JR., AND JOHN F. MAGEE, JR.,
*Petitioners,*

*v.*

KATHLEEN F. LANE,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

DAVID L. WHITNEY,
31 St. James Avenue,
Boston, Massachusetts 02116,
Attorney for Respondent.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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# Supreme Court of the United States.

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*Petitioners,*
*v.*
KATHLEEN F. LANE,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

### Statement of the Case.

This is an action of tort arising out of an automobile pedestrian accident that occurred in Brookline, Norfolk County, Massachusetts, on February 23, 1959. By writ dated August 4, 1959, Brian T. Magee, a minor, sought to recover for injuries sustained by him, and his father, John F. Magee, Jr., sought to recover consequential damages. The defendant John F. Lane, Jr., was the absent owner of the automobile in question, which was operated by the defendant Kathleen F. Lane. The action was tried before an auditor in the Middlesex Superior Court in May, 1961. The auditor, finding that the minor plaintiff was not in the exercise of due care and that the defendants were not negligent, found for the defendant on each of the four

counts of the declaration. Subsequently the action was tried to a jury on the auditor's report and other evidence, and the jury returned a verdict for the minor plaintiff, Brian T. Magee, in the amount of $1,200 and for his father, John F. Magee, Jr., in the amount of $1,200, against the defendant Kathleen F. Lane. Verdicts were returned for the defendant on both counts against the defendant John F. Lane, Jr.

On December 13, 1961, the plaintiffs filed a bill of exceptions, which, after multiple hearings, was allowed as to exceptions taken to the denial of the plaintiffs' motion to discharge the order of reference to the auditor and to the denial of the plaintiffs' motion to recommit report to the auditor. The bill of exceptions was otherwise disallowed on the grounds that the exceptions alleged were not conformable to the truth and that the statement of the exceptions alleged was argumentative, gratuitous and incomplete and was not a true and fair statement of the proceedings to which the exceptions alleged referred. See memorandum and order on plaintiffs' exceptions annexed hereto and marked "Appendix A" (R1 24-26).*

Following the filing of said memorandum and order on June 19, 1962, the plaintiffs filed a petition to establish the truth of exceptions in the Massachusetts Supreme Judicial Court for the County of Suffolk, and on December 19, 1962, said petition was ordered dismissed by a single justice. No exceptions were taken by the plaintiffs to this order and the plaintiffs proceeded on their bill of exceptions as allowed by the trial justice.

The exceptions of the plaintiffs were argued in the Massachusetts Supreme Judicial Court on November 4,

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*R1 refers to record in case of Brian T. Magee, p.p.a. et al., *v.* Kathleen F. Lane et al., consisting of two volumes. R2 refers to record in case of Brian T. Magee, p.p.a. et al., petitioners.

1963, and were overruled on November 29, 1963. *Magee v. Lane,* 346 Mass. 475 (Appendix to Petition, pp. 13-16).

The plaintiffs' motion for a new trial was denied by the trial justice on February 20, 1964. On March 16, 1964, the plaintiffs filed a bill of exceptions. On March 25, 1964, the bill of exceptions was disallowed on the grounds that the exceptions were not conformable to the truth; that the plaintiffs, or their attorney, intentionally omitted to include in said bill important testimony of witnesses given at the trial on issues presented to the court and jury for determination, and intentionally omitted to include in said bill other important proceedings at the trial; that the bill did not set forth a full and fair summary of the proceedings at the trial adequate to show the whole case which was surveyed and considered by the court. See findings, rulings and order, Appendix B (R2 18-19).

On April 10, 1964, the petitioners filed a petition to establish the truth of exceptions in the Massachusetts Supreme Judicial Court for the County of Suffolk. On April 22, 1964, said petition was argued before a single justice of said court and was thereafter referred to a court-appointed commissioner. The commissioner submitted a report to the court in which he found that the plaintiffs' bill of exceptions did not conform to the truth. See report of commissioner (R2 25-35).

Following the filing of the commissioner's report on December 2, 1964, the single justice of the Massachusetts Supreme Judicial Court found, on the basis of the commissioner's report and his own examination of the transcript of the evidence, that the bill of exceptions was not conformable to the truth. The court allowed the respondent's motion to dismiss the petition to establish the truth of exceptions. Appendix C (R2 52).

The petitioners' exceptions to the rulings and orders of the single justice were overruled by the Massachusetts Supreme Judicial Court on April 28, 1966. *Brian T. Magee et al., petitioners,* 1966 Mass. Adv. Sh. 797 (see Appendix to Petition, pp. 12-13).

No consitutional or federal question was raised or decided during any phase of the proceedings up to and including the rescript opinion of the Massachusetts Supreme Judicial Court on April 28, 1966.

By letter dated June 9, 1966, and addressed to the Chief Justice of the Massachusetts Supreme Judicial Court, counsel for the petitioners requested a rehearing, and on June 14, 1966, the request was denied (see Appendix to Petition, pp. 16-28).

**Argument.**

The question presented in the petition (pp. 2-3) is pure fiction. It is wholly argumentative and gratuitous and posited on unwarranted and totally unsupported and unsupportable assumptions. The injuries sustained by the minor plaintiff and the compensation to be awarded therefor were questions of fact that were properly submitted to the jury. The jury had not only a right, but also a duty to assess damages on testimony that it accepted as trustworthy. The jury had a right to disbelieve and refuse to accept all or any part of the testimony of the plaintiffs and their witnesses. *Lydon* v. *Boston Elevated Railway Co.,* 309 Mass. 205, 206, 207. *O'Brien* v. *Harvard Restaurant & Liquor Co., Inc.,* 310 Mass. 491, 493. *Barr* v. *Warren,* 299 Mass. 60, 63. *Cerrato* v. *Miller,* 264 Mass. 533.

The jury assessed damages for the minor plaintiff in the amount of $1,200, and no other assessment of damages is found anywhere in the entire record except in the gratuitous and unwarranted statements of alleged value

in the petition. Such a fictitious statement of value does not fulfill the petitioners' obligation to show that a constitutional question was raised seasonably in the state court.

An examination of the record compels the conclusion that the decisions of the Massachusetts courts rested wholly on state rather than federal grounds, and the courts of the Commonwealth of Massachusetts were never called upon in any stage of the proceedings to consider or decide a federal question. The courts of the Commonwealth of Massachusetts disallowed the petitioners' bills of exceptions on the basis that they were not in conformity with the long-established statutes, rules and decisions of the Commonwealth of Massachusetts governing uniform and orderly methods of appellate procedure.

The petitioners' substitute bill of exceptions (filed April 4, 1962) (R1 24) was disallowed in part because it was not conformable to the truth as required by General Laws of Massachusetts, c. 231, § 113. Appendix A (R1 24-25).

The petitioners' bill of exceptions, filed March 16, 1964, was disallowed because it was not conformable to the truth. Appendix B (R2 18-19).

The single justice of the Massachusetts Supreme Judicial Court found that the petitioners' bill of exceptions was not conformable to the truth, and accordingly allowed the respondent's motion to dismiss the petition to establish the truth of exceptions. Appendix C (R2 52).

The petitioners' exceptions to the allowance of the respondent's motion to dismiss the petition to establish the truth of exceptions were overruled on purely state grounds. *Brian T. Magee et al., petitioners,* 1966 Mass. Adv. Sh. 797 (see Appendix to Petition, pp. 12-13).

The record establishes, beyond cavil, the fact that no federal question was ever presented or argued to or decided by the courts of the Commonwealth of Massachu-

setts. The petitioners failed to comply with the clear, concise and unambiguous requirements of the laws of the Commonwealth of Massachusetts regarding appellate procedure. The petitioners have not established the grounds necessary to give this Honorable Court jurisdiction to review the judgment of the courts of the Commonwealth of Massachusetts on a writ of certiorari. *In re Lamkin,* 355 U.S. 59. *Mellon Co.* v. *McCafferty,* 239 U.S. 134. *Durley* v. *Mayo,* 351 U.S. 277. *Stembridge* v. *Georgia,* 343 U.S. 541. *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62. *Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U.S. 206. *Lynch* v. *New York,* 293 U.S. 52.

The abortive attempt of the petitioners to raise a constitutional question for the first and only time in the letter of June 9, 1966, addressed to the Chief Justice of the Massachusetts Supreme Judicial Court, does not aid the petitioners and does not compensate for the failure to raise a constitutional question during the proceedings in the state courts. *Hanson* v. *Denckla,* 357 U.S. 235. *Radio Station WOW, Inc.,* v. *Johnson,* 326 U.S. 120. *Herndon* v. *Georgia,* 295 U.S. 441.

**Conclusion.**

From the foregoing it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID L. WHITNEY,
31 St. James Avenue,
Boston, Massachusetts 02116.

Of Counsel,
DANIEL A. LYNCH,
PAUL F. DEGNAN.

## Appendix A.

MEMORANDUM AND ORDER ON PLAINTIFFS' EXCEPTIONS.

At the hearing on January 4, 1962 on the question of allowance of the bill of exceptions filed December 13, 1961, the difficulties with the bill were pointed out in the Defendant's Motion to Disallow Plaintiff's Bill of Exceptions and in the oral argument, and, thereupon, leave was granted plaintiffs to file within forty-five (45) days proposed amendments "as will make (the bill) a more accurate statement of the exceptions originally filed." On February 16, 1962 a paper entitled "Proposed Amendments to Plaintiff's Bill of Exceptions" was presented to the undersigned. After examination of that paper upon its presentation disclosed its insufficiency the Court forthwith denied leave to plaintiffs to file the same, but thereafter, on February 27, 1962, ordered the paper filed and, treating it as a motion, set it down for hearing on March 6, 1962 together with the question of the allowance of the bill. Again at the hearing on March 6, 1962 the deficiencies in the bill were pointed out in specific detail, and that the same were not cured by the paper presented February 16, 1962, and on that day the leave granted plaintiffs to present "such proposed amendments to the bill as will make it a more accurate statement of the exceptions originally filed" was extended to and including April 3, 1962. "Plaintiffs' Motion For Leave to File A Substitute Bill of Exceptions and Plaintiffs' Substitute Bill of Exceptions" was presented to the Court on April 3, 1962, and the Court ordered the same filed. A hearing on the allowance of that motion was held April 9, 1962. That motion has been allowed today.

Except for the exceptions alleged to the denial of the plaintiffs' motion to discharge the order of reference to

the auditor and to the denial of plaintiffs' motion to recommit the report to the auditor, the exceptions alleged in the substitute bill are not conformable to the truth. The statement of the exceptions alleged to the rulings of the Court on the admission and exclusion of evidence offered by the parties, to the alleged denial of certain requests for rulings filed by the plaintiffs, and to the denial of plaintiffs' motion for mistrial, is argumentative, gratuitous and incomplete and is not a true and fair statement of the proceedings to which the exceptions alleged refer.

The bill of exceptions filed December 13, 1961 was found to be not conformable to the truth and that the exceptions were not reduced to writing in a summary manner; and, if leave to amend had not been granted plaintiffs, would have been disallowed in its entirety after hearing on January 4, 1962.

The substitute bill of exceptions is hereby allowed as to the exceptions taken to the denial of plaintiffs' motion to discharge the order of reference to the auditor and to the denial of plaintiffs' motion to recommit report to the auditor; the substitute bill of exceptions is disallowed otherwise.

FRANK J. MURRAY
Justice of the Superior Court

June 18, 1962

Received and filed
June 19, 1962
Clerk of the Courts
Norfolk County

## Appendix B.

### Findings, Rulings and Order.

After hearing (1) defendants' motion to dismiss plaintiffs' bill of exceptions, and (2) arguments on the question whether the said bill of exceptions should be allowed, I find

(a) the plaintiffs' claim of exceptions to the denial of plaintiffs' motion for new trial was seasonably filed with the Clerk on February 25, 1964;

(b) that plaintiffs filed the said bill of exceptions on March 16, 1964, more than twenty days after the filing with the Clerk on February 21, 1964 the opinion, ruling, direction or judgment of the Court denying plaintiffs' motion for new trial, and within twenty days after receipt by plaintiffs from the Clerk of notice thereof on February 24, 1964;

(c) that if the said bill of exceptions was seasonably filed under General Laws (Ter. Ed.), c. 231, s. 113, and Rule 73, then it was seasonably presented to me for allowance on March 24, 1964 pursuant to General Laws (Ter. Ed.), c. 231, s. 114;

(d) that on March 11, 1964 the plaintiffs presented to me a motion to extend time for filing a bill of exceptions, which was assented to by the defendant; that the motion failed to set forth the matters required by Rule 73 and I denied the same; that on March 13, 1964 the plaintiffs again presented to me a motion to extend time for filing a bill of exceptions which failed to comply with the requirements of Rule 73, and I denied that motion.

I have assumed that plaintiffs, or their attorney, have failed, through inadvertence (especially in view of the assent given by the defendants' attorney to the first mo-

tion to extend the time for filing a bill of exceptions), to comply with the provisions of General Laws (Ter. Ed.), c. 231, s. 113, with respect to the seasonable filing of their exceptions, and I have, therefore, considered whether the said bill is properly before me on the question of allowance (see General Laws (Ter. Ed.), c. 231, s. 113, sixth sentence) as having been filed in good faith and that justice requires its allowance.

I find after examination of the exceptions, and after hearing the parties, that they are not conformable to the truth. I find that plaintiffs, or their attorney, intentionally omitted to include in said bill important testimony of witnesses given at the trial on issues presented to the Court and jury for determination, and intentionally omitted to include in said bill other important proceedings at the trial. I find that the bill does not set forth a full and fair summary of the proceedings at the trial adequate to show the whole case which was surveyed and considered by the Court after hearing arguments by the parties on the grounds set forth in plaintiffs' motion for new trial, and that the plaintiffs, or their attorney, intentionally omitted to include such matters in said bill. The allowance of the said bill would not, in my opinion, be in the interests of justice. I am not satisfied that the said bill was filed in good faith. The said bill is hereby disallowed.

FRANK J. MURRAY
*Justice of the Superior Court.*

March 25, 1964.

A true copy
Attest: H. T. Hetnik
*Asst. Clerk*

## Appendix C.

FINDING AND ORDER DISMISSING PETITION.

On the basis of the commissioner's report and my own examination of the transcript of evidence in the case of Brian T. Magee, p. p. a., et al vs. Kathleen F. Lane, et al, Superior Court for Civil Business in Norfolk County No. 67720, I find that the bill of exceptions is not conformable to the truth. Accordingly, I allow the respondent's motion to dismiss the petition to establish the truth of the exceptions.

In view of the foregoing I deem it unnecessary to pass on the petitioners' requests for rulings even if I assume that they have any standing in this proceeding.

JACOB J. SPIEGEL

December 28, 1964 *Justice, Supreme Judicial Court*

Copy,
Attest:
JOHN E. POWERS.
*Clerk.*